

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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(NOV 23 1993)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
GN Docket No. 93-252

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act)
)
)
Regulatory Treatment of)
Mobile Services)

REPLY COMMENTS OF CENCALL COMMUNICATIONS CORPORATION

CenCall Communications Corporation ("CenCall"), by its attorneys and pursuant to the Commission's Notice in this proceeding,¹ hereby submits its reply comments concurring with the reply comments submitted by both Nextel Communications, Inc., and the American Mobile Telephone Association ("AMTA"), and emphasizing certain other points.

I. Introduction and Summary

In its Notice, the Commission requested, among other things, comments as to whether it should forbear from regulating commercial mobile service providers, such as ESMR providers, under Title II of the Act, and if so, how.²

¹ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Notice of Proposed Rulemaking, CC Docket No. 93-252 (Rel. October 8, 1993) ("Notice").

² Id. at ¶ 62.

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As discussed in its Initial Comments,³ CenCall is an operator and manager of Specialized Mobile Radio Services in the Rocky Mountain, Midwest and Pacific Northwest regions of the United States and intends to provide Enhanced Specialized Mobile Radio Services ("ESMR") in the near future. Thus, CenCall has a direct interest in the outcome of this proceeding, especially with respect to the level of regulation that may or may not apply to ESMR providers.

As an intended ESMR provider, CenCall indicated in its Initial Comments that the Commission should exercise its authority to forbear from applying Title II regulation to ESMR providers as proposed in the Commission's Notice.⁴ CenCall agreed with the Commission's conclusion that competition in the commercial mobile services market is sufficient to permit forbearance from tariff regulation of the rates for commercial mobile services as well as the Commission's recognition that ESMR providers are presumed to lack market power to control prices or to discriminate unreasonably.⁵ CenCall continues to urge the Commission to forbear from regulating ESMR providers under Title II of the Communications Act of 1934, as amended.⁶

³ Comments of CenCall Communications Corp., submitted November 8, 1993 ("Initial Comments").

⁴ Id.

⁵ See id.

⁶ 47 U.S.C. §§ 1, et seq. ("Communications Act").

II. The Commission Should Forbear from Regulating ESMR Providers

CenCall submits that the record in this proceeding continues to support the Commission's conclusion that competition in the commercial mobile services market is sufficient to permit forbearance from Title II regulation.

In determining whether to forbear from regulation, Section 332(c)(1)(C) requires the Commission to "review competitive market conditions with respect to commercial mobile services The Commission has tentatively delineated the competitive market for commercial mobile services to include those commercial mobile services that are "PCS services [], cellular services, specialized mobile radio services, paging services, wireless in-building services, cordless phones, and others."⁷ The record in this proceeding overwhelmingly supports the Commission's proposed definition of the market for commercial mobile services when determining whether competition exists in the commercial mobile services market.⁸

In comments submitted by NABER, however, which purport to represent the interests of "large and small businesses that use and provide land mobile radio communications,"⁹ including ESMR providers, an entirely new test is put forth based apparently on

⁷ Notice at ¶ 62 (citing Notice of Proposed Rule Making, GEN Docket 90-314, 7 FCC Rcd 5676 (1992) at 5712).

⁸ See, e.g., Comments of Nextel Communications, Inc., Comments of AMTA, Comments of Motorola, and Comments of the Industrial Telecommunications Association, submitted November 8, 1993.

⁹ Comments of NABER, submitted November 8, 1993, at 1.

some sort of spectrum allocation test. CenCall wishes to inform the Commission that CenCall does not support NABER's comments and, indeed, questions whether these comments could ever represent the interests of ESMR providers or other land mobile radio providers.

NABER's comments are based on an unofficial "White Paper" authored by NABER's president that proposed two classes of commercial mobile service providers: "Commercial 1/Open Entry," and "Commercial 2/Limited Entry." On the one hand, the comments propose that "Commercial 2/Limited Entry," would include cellular, ESMRs, and soon PCS ("voice-based services that use broad based spectrum"), and on the other, that "Commercial 1/Open Entry," would include other commercial mobile services, such as paging and for-profit two-way radio (occupying limited spectrum and enjoying significant competition).¹⁰ The comments further propose that the "criteria for delineation between these two subgroups would be based either in terms of the amount of spectrum used by a licensee in a given market or based on the relative percentage of available spectrum licensed to a particular provider."¹¹ Apparently, NABER would impose some type of "equal, but separate" treatment of commercial mobile services providers based on its proposed classifications.¹²

¹⁰ NABER Comments at Appendix A ("White Paper").

¹¹ Id.

¹² Id.

CenCall notes that no economic or market studies, legal authority, or support of any kind is offered by NABER in support of its proposals. CenCall is also alarmed that NABER so blatantly disregards the interests of so many of its constituents and customers and fails to understand why NABER would not consult all of its customers/constituents when formulating the position taken in its comments and self-titled "White Paper." Thus, CenCall emphasizes that NABER does not speak for all of the groups that it purports to represent.

CenCall urges the Commission instead to pursue its well thought out approach and long-standing historical policy to forbear from enforcing the provisions of Title II in those instances where it is not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends."¹³

¹³ Memorandum Opinion and Order, CC Docket No. 93-36, para. 12 (Rel. Aug. 18, 1993) (MO&O). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,701 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993; Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 96 FCC 2d 1020 (1985) (Sixth Report), rev'd, MCI Telecommunications Corp. v.

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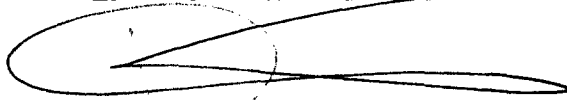
The Commission's long-standing approach would dictate that the Commission forbear from regulating ESMRs.

III. Conclusion

In conclusion, CenCall agrees with the reply comments of Nextel Communications, Inc. and AMTA, and further urges the Commission to heavily discount NABER's comments as not representative of the industries that NABER purports to represent and not supported by any authority whatsoever.

Respectfully submitted,

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¹³(...continued)

FCC, 765 F.2d 1186 (D.C.Cir. 1985) (MCI v. FCC). Although in MCI v. FCC the court reversed the Commission's forbearance of the Communication Act's tariff requirements, Congress clearly gave the Commission the authority to forbear from regulating the commercial mobile services market in this instance.